

1 Victory Energy would need to be able to sell those features in
2 order to be competitive. And that was good for both companies,
3 a win-win. Victory sells boilers, Erie Power gets its royalty.

4 To help you understand this case a little bit
5 better, it's a good idea to explain what a boiler does. An
6 industrial boiler is the same as the boilers and the hot water
7 heaters that we have in our own homes. Basically, it consists
8 of a vessel where you heat water, and in the case of these
9 industrial boilers, you heat it to steam.

10 There are three types of, predominantly three types
11 of watertube boilers. There's the D-type, A-type and the
12 O-type. And literally get their names from their shapes.
13 D being the shape of a D, A and O. This case involves the
14 O-type watertube package boiler.

15 Now, watertube boilers are used primarily today to
16 make steam to power large industrial machines and to provide
17 steam as heat for factories. And also in certain instances to
18 make electricity.

19 Back in the last century, boiler manufacturers sold
20 boilers with tubes of walls literally lined up and touching.
21 As you can see here, this is an old Zurn brochure that was
22 distributed publicly, about 27 years ago, it was from 1980. If
23 you could zero in on that, Jeremy, please. There we see the
24 tubes are literally touching. And that's the way these boilers
25 were designed up until about 20, 25 years ago.

1 Again, as I indicated, it became important for the
2 gaps between these tubes to be sealed so that the incombustible
3 fuel, that means the gas that gets shot into these boilers, all
4 gets burned up. Because if it doesn't get burned, it can leak
5 through and that causes pollution.

6 So initially what some boiler manufacturers would do
7 is literally run a bead up these tubes. That was called seal
8 welding. But that quickly proved to be an inefficient method
9 of fixing this emissions problem. Because seal welding is time
10 consuming, it's inefficient and, most importantly, it can
11 cause, when you're welding those tubes together, it can cause
12 the welder to burn right through the tube causing damage to the
13 boiler.

14 So there was an innovation made, which dates back 50
15 years to have membrane walls on the tubes. Membrane walls are
16 just what it sounds like. You have a tube, these are two-inch
17 tubes, ladies and gentlemen, the tubes have fins on them and
18 stick out just like this. You butt the two fins together, you
19 run a bead or a weld right between those tubes. And you create
20 a wall, a membrane wall. That is what we're talking about
21 here. Membrane wall construction.

22 By doing this, it effectively seals in the gases so
23 that all the fuel can be combusted, solves the problem. Also,
24 a better way of building a boiler because it provides the
25 boiler with more structural soundness and it's cheaper to make.

1 Tubes cost more than bars. So you take the tubes out, you put
2 the bars in, it saves you money.

3 Now, there are a number of standards that you're
4 going to hear about during this case that govern what boiler
5 manufacturers can and can't do in terms of putting these
6 boilers together. The primary standards are from the American
7 Society of Mechanical Engineers, that's the ASME code. And the
8 standards that are governed by the American Welding Society.
9 The AWS code. Those will govern the way in which you can put
10 these boilers together. You'll hear some evidence about that.
11 I'll get back to that in a minute.

12 Now, the parties recognize that in order for Victory
13 Energy to be successful in selling the Keystone boiler, it
14 would need to include membrane walls. Without the competitive
15 enhancements, there was no win-win under the license. Without
16 a win-win, Victory can't sell boilers and Erie Power doesn't
17 get the royalties.

18 Now, although these are commodity products, these
19 are not off the shelf products. You saw the size of the
20 industrial watertube boilers and the way that they are used in
21 a customer's fabrication shop. This isn't something you just
22 roll out of your warehouse where you got it moth balled. They
23 have to be designed so they can fit within the customer's
24 space. You need to have some flexibility with doing that. For
25 instance, not every boiler operates at the same altitude or

1 temperature. Also, the customer may have a limited size
2 restriction, so you have to allow for variations in size.

3 Now, the parties recognize that Victory would need
4 this flexibility. Due to the absence of the Keystone boiler
5 from the marketplace, it had not been actively marketed for
6 over 10 years, the only designs that Erie Power had available
7 were the old tangent tube designs for the standard models. You
8 will hear testimony there never has been any standard designs
9 or drawings for membrane wall boilers.

10 So the only thing that Victory could get standard
11 for the various sizes of boilers, were the tangent tube
12 drawings. And the parties understood that. And that was okay
13 with Victory Energy and Erie Power, again, win-win. They
14 recognized that Victory would have to spend some time making
15 its own membrane wall drawings so that it could sell these
16 Keystone boilers. That was okay with Victory, they were more
17 than willing to do their fair share to get this off the ground.

18 Now, in order to put this understanding into a
19 contract, Mark White, who was the director of sales and
20 marketing at Erie Power at the time, drafted an agreement that
21 would have allowed for flexibility. He drafted an agreement so
22 that the parties knew and understood that they would be able to
23 build boilers with the features that customers wanted and with
24 the enhancements that customers demanded.

25 You'll see here the definition of products in the

1 License Agreement. "Products shall mean natural circulation
2 industrial watertube package steam generators with a steam
3 capacity range between 29,000 up to and including 150,000 pph,"
4 as you heard that is pounds per hour.

5 The next sentence, ladies and gentlemen, which
6 Indeck wants you to forget all about, they tell you it doesn't
7 mean anything, just throw it out, doesn't help us, so just
8 forget about it. It says "products shall include but not be
9 limited to the items set forth in Annex I." Why would they say
10 that, "products shall include but not be limited to the items
11 set forth in Annex I."

12 They said that because they knew this agreement
13 would need to have flexibility for Victory Energy to sell the
14 boilers that customers wanted, meeting the customers
15 expectations.

16 Now, Annex I which you heard about, also provided
17 information that is relevant. Annex I describes the products
18 in the first line. "Description of products. Erie Power
19 Technologies, Inc. M-Series Keystone watertube boilers to
20 include the 8M, 9M, 10M," all way up to the 22M. Now, below
21 that is the design. "For the purposes of this agreement, the
22 thermal performance of the above M-Series Keystone boilers,
23 products, are based on the following design parameters."

24 A design parameter, ladies and gentlemen, that's an
25 important thing to understand when reading Annex I. A design

1 parameter is basically assumptions that engineers are going to
2 make, in other words, information in, in order to figure out
3 what the boiler is going to do. In other words, the heat and
4 steam coming out, okay. So the design parameters I've outlined
5 in this document are assumptions. They assume that the boilers
6 are going to operate at 150 pressure, at 80 degrees Fahrenheit,
7 at 1,000 feet above sea level elevation.

8 There are other parameters in this document, ladies
9 and gentlemen. There are parameters, such as the drawing that
10 you were shown earlier on the fourth page of the document.
11 Jeremy, if you could go to that drawing for me, please.

12 And the drawing is on page four, shows Keystone
13 M-Series standard. Now, that's a slippery term that you didn't
14 hear anything about a minute ago. Notice in the description of
15 products, it says Keystone M-Series, didn't say anything about
16 standard, it said Keystone M-Series. Don't let Indeck slide
17 that by you. There is a difference, they want you to believe
18 it's what's only identified right here, it can't vary in any
19 way, shape or form.

20 You will hear extensive testimony it would have been
21 impossible for Victory to sell even one boiler following this
22 exact recipe, as they call it.

23 Now, these are design parameters, ladies and
24 gentlemen. The thermal performance, in other words, what these
25 boiler models can do, is based on the assumptions that you're

1 using a boiler at 80 degrees and at a thousand feet in
2 altitude, with tangent tube walls. Does that mean you can only
3 sell tangent tube walls, absolutely not.

4 It's like the baking instructions on the back of
5 your cake recipe. If you're going to bake this, bake at 450
6 degrees for 20 minutes. But if you're in high altitude, you've
7 got to lower the amount of flour, you got to increase the
8 temperature. These are design parameters. They are not meant
9 to be set in stone provisions that set the outer limits of the
10 agreement. The evidence will show that, ladies and gentlemen.

11 There are other provisions of the agreement that's
12 specifically identified. There are other provisions of the
13 agreement that specifically identify that this agreement must
14 have flexibility.

15 Victory Energy agreed to have a non-compete in this
16 License Agreement. Why is that relevant in a non-compete.
17 What the agreement says is Victory could only sell these
18 products and nothing in competition with these products. So
19 what that means is, if you take what Indeck is telling you,
20 that Victory was only allowed to sell tangent tube boilers that
21 nobody wanted, not only could it not sell under the license,
22 but it couldn't go with any other product that might actually
23 be successful. So it would have locked Victory Energy out of
24 the marketplace for an entire three years. That can't be what
25 the companies intended. That doesn't make any sense.

1 Now, ladies and gentlemen, the parties, there is a
2 term that we use in the law called course of conduct. That is
3 what did they do, what did they actually do under the License
4 Agreement. That is very telling in this case. You will see
5 that, you will hear that within days of the signing of the
6 License Agreement, Victory sold three boilers to a company
7 called Broin Industries. All three of those boilers, membrane
8 wall construction.

9 What did Erie Power do, did they say hey, whoa, no
10 you're only allowed to sell the tangent tube, you can't sell
11 membrane wall boilers. Absolutely not. They said here are
12 some other drawings that have membrane walls, here's how you
13 design these boilers. Here are the steps that you need to
14 take. And Victory Energy needed that information if it was
15 going to follow the exact standards that were set forth by Erie
16 Power. So they followed those directions, and with Erie
17 Power's help, they built membrane wall boilers.

18 Also, you will hear evidence about the sales manual
19 that was provided to Victory Energy. Within the first 70 days
20 of the License Agreement, this sales manual was provided to
21 Victory Energy. The sales manual, by the way, was drafted by
22 Mark White, director of sales and marketing for Erie Power. He
23 did it because under the License Agreement, they were supposed
24 to help him with sales and marketing materials.

25 So Mark puts together, Mr. White puts together this

1 sales manual, specifically for Victory Energy. He pulled it
2 together from six or seven other presentations, identifying
3 specific features that Victory would need in order to market
4 this boiler under the License Agreement.

5 And if you look at what the features are, at the top
6 it says "Keystone M-Series. Furnace wall construction. Welded
7 tube and membrane." So in the sales materials that were
8 provided to Victory in the first 70 days of the license,
9 they're saying yep, this it is membrane wall, folks, go and
10 sell it. This is a good picture, use this in your sales and
11 marketing materials. Jeremy, go to the next slide, please.

12 The next slide, outer walls, membrane. Furnace
13 walls, membrane. This is the sales manual that was drafted for
14 Victory Energy by Erie Power to sell these boilers. And then
15 front wall, welded tube and membrane wall cooled burner throat.

16 You're going to hear testimony about this water
17 cooled burner throat. That's just a fancy way of saying it had
18 membrane walls on the front wall too, okay.

19 So this evidence is very clear. Erie Power, if they
20 really believed it didn't include membrane walls, why are they
21 providing all of this information to Victory in order to go and
22 sell these boilers. Look at what they did, not what they're
23 trying to tell you today on the stand.

24 When you hear these engineers on the stand, look at
25 what they did then, they helped build these boilers, they

1 provided the sales materials.

2 Victory Energy also received sales brochures. If
3 you go on to the next one, please, Jeremy. This is the sales
4 brochure that was provided to Victory Energy. And Victory
5 Energy, I'm sorry, Erie Power's director of sales and
6 marketing, Mark White, said here's some brochures. He gave
7 them to you when they came to Erie for training. He said
8 here's some brochures, you should use these brochures in order
9 to sell these Keystone boilers. The brochures, by the way,
10 have the same features. Membrane walls and water cold burner
11 throats. All the same features that they're telling you today
12 Victory was not authorized to use.

13 You will hear testimony that Erie Power's engineers
14 always believed that the agreement was only for tangent tube.
15 And that several times they had this discussion internally with
16 Erie Power. What you will not hear anyone from Erie Power tell
17 you that Victory Energy was told they violated the agreement,
18 they were not authorized to do it any more, stop. It didn't
19 happen. Despite that letter that you saw from Mr. Gdaniec for
20 March 26th. You will hear exactly why that letter was sent,
21 the true motive behind that letter. Erie Power was trying to
22 sell the technology, when Victory said sure, we'll buy the
23 Keystone boiler line. That's when they did the bait and switch
24 and said oh, wait a minute, no, we'll sell you the tangent
25 tube. Victory Energy said the tangent tube, why would we want

1 to buy that, we're selling membrane wall boilers, nobody wants
2 tangent tube boilers.

3 And it was in the course of that where this letter
4 generated saying hey, you're outside the scope of the license.
5 Victory wrote back and said no, we're authorized to sell these
6 boilers, that's what we've been selling.

7 What did Erie Power do that after. What did they do
8 after they got that letter or after they received the letter
9 back from Mark White. They continued to help Victory build
10 membrane wall boilers.

11 Look at what they did, not what they say, okay.
12 They helped Victory for the entire time that Erie Power was the
13 licensor, the entire 18-month period they helped them build
14 membrane wall boilers.

15 Now, another important theme for you, ladies and
16 gentlemen, is to follow the money. During the time of the
17 License Agreement, when Erie Power was the licensor. Erie
18 Power not only helped them engineer these boilers, but when
19 they received notice of sales, they invoiced Victory Energy for
20 the royalties that they were entitled to. And they received
21 checks back from Victory Energy for all the boilers that were
22 sold during the time that Erie Power was the licensor. And
23 they cashed those checks. In fact, after Indeck became the
24 licensor, they continued to issue invoices and cashed checks.

25 Follow to the money, ladies and gentlemen. Don't

1 listen to what they're trying to tell you today. If their
2 actions before clearly show what their true understanding and
3 intent was. They knew these included membrane walls. Why else
4 would they have helped build them, why else would they have
5 helped sell them and why else would they have cashed the
6 checks.

7 You will also hear that this running theme from
8 Indeck that there was a separate authorization, there was an
9 understanding that well, we just let them do it on a one at a
10 time basis because we needed the money. Well, the agreement is
11 clear, you don't get to do that. If you want to change the
12 agreement, if you want to give somebody a right, other than
13 what's set forth in the agreement, you have to do it in
14 writing.

15 There's no writing that ever shows that Erie Power's
16 authorization, their help, their approval, their assistance,
17 with Victory Energy building these boilers was done outside the
18 license. And if there is no separate agreement, what does that
19 mean, it was clearly inside the license.

20 As you heard, Erie Power went into bankruptcy and
21 ultimately out of business. In August of 2004, Erie Power sold
22 its assets to CMI EPTI. The entered into an asset purchase
23 agreement. And under, as part of the bankruptcy, they filed
24 that document with the bankruptcy court. The top was
25 unfortunately highlighted, so it's a little difficult to read,

1 but I'll show you a better copy of the same sentence from
2 another document in a minute.

3 The top sentence, Erie Power's representation to the
4 people buying the Keystone boiler business, CMI. The
5 representation from Erie Power "to seller's knowledge, no third
6 party is infringing or using or has misappropriated any of the
7 intellectual property rights." So Erie Power is telling the
8 buyer we don't know of anybody that's misappropriated our
9 technology. Nobody.

10 And then the second one, "no license or royalty
11 agreement to which seller is a party is in breach or default by
12 any party thereto or the subject of any notice of termination."
13 Stephen Kang, president of Erie Power, signed this. He will
14 indicate, you'll hear his testimony by videotape. He
15 specifically said yes, that was my understanding. I didn't
16 know of any breaches of any License Agreement, I could not
17 conclude that Victory Energy ever breached the License
18 Agreement.

19 That's a representation that was made specifically
20 to CMI EPTI. And as I showed you on the chart, two weeks
21 later, less than two weeks later, CMI turned around and sold
22 Keystone assets to Indeck Keystone Energy. And Indeck Keystone
23 Energy was specifically told by CMI in the asset purchase
24 agreement, "to seller's knowledge the intellectual property
25 rights do not infringe on or conflict with the rights of the

1 intellectual properties of third parties, and seller has not
2 received" --

3 THE COURT: Way too fast, start that all over again.

4 MR. SHEEAN: Sorry, judge. "To seller's knowledge,
5 the intellectual property rights do not -- I'm sorry, Jeremy,
6 you need to highlight C and not B. It's the same sentence in
7 an the earlier agreement, ladies and gentlemen. "To seller's
8 knowledge, no third party is infringing or has misappropriated
9 any of the intellectual property rights. No license or royalty
10 agreement to which seller is a party is in breach or default by
11 any party thereto."

12 Indeck bought the assets, the Keystone assets, based
13 on these representations on September 8, 2004. Less than two
14 months later they filed this lawsuit. What does that tell you.
15 Indeck wasn't interested in trying to work out a good
16 relationship with its licensee. It wanted to use whatever
17 means possible, competitive revenge, ladies and gentlemen, they
18 wanted to stop Victory from competing fairly in the
19 marketplace.

20 Since IKE has filed this lawsuit, and IKE is a
21 shorthand term for Indeck Keystone Energy, since IKE has filed
22 this lawsuit, it invoiced Victory Energy over eight times for
23 four of the boilers sold. They received checks for those
24 boilers and it cashed those checks. Follow the money, ladies
25 and gentlemen.

1 Now, the License Agreement had an initial term of
2 three years. And either party could choose not to renew. Once
3 Indeck became the licensor, sent a threatening letter and then
4 filed a lawsuit, it became fairly clear to Victory Energy that
5 Victory was going to have to find a new means if it wanted to
6 continue to sell watertube boilers. It would have to come up
7 with its own design.

8 Victory Energy began that process in the fall of
9 2004. There's no prohibition on Victory doing that. Victory
10 is not precluded from developing its own line of boilers while
11 selling Keystone. Despite any claim or any implication
12 otherwise.

13 And Victory Energy expended thousands of hours and
14 hundreds of thousands of dollars in developing the Voyager
15 line. You'll hear testimony from Mark White about the various
16 extensive activities that Victory had to undertake in order to
17 develop this Voyager boiler.

18 Victory hired consultants in order to design the
19 base of the boiler. The base of the boiler, by the way, they
20 will admit, is completely different from the Keystone. They
21 hired a separate consultant to design the software program so
22 that Victory could rate these boilers. What does that mean
23 when you say rate the boilers. You have to use software, the
24 software is the shorthand calculation for the engineering that
25 has to be done to determine how much steam the boiler is going

1 to make, how much heat it's going to produce. So that it will
2 operate efficiently and safely to the customer's specification.

3 So Victory spent an extensive amount of money on the
4 software. And it paid another outside engineer to run
5 circulation studies of the boilers, so it would know if the
6 boilers were operating efficiently. Why is that important.
7 Well, if as Indeck claims, Victory stole these designs, why is
8 it spending all this money on designing its own boiler. And if
9 Victory stole these designs or copied them inappropriately, why
10 is it that the boilers are different.

11 You heard from Indeck's own lawyer. These boilers
12 have significant differences, ladies and gentlemen, as to how
13 they operate. There are significant differences. And the
14 similarities between the boilers are similarities with all of
15 O-style watertube boilers out there.

16 You heard already a little bit about public domain
17 and what's available in the public domain. You heard the judge
18 give you an instruction on what public domain means. It's just
19 a fancy term for what can be found publicly by you or I if we do
20 a little bit of homework.

21 If something is in the public domain, ladies and
22 gentlemen, it is not a secret. And if it's not a secret, it
23 can't be copied and it can't be stealing. The products we are
24 talking about have been around a long time. O-style boilers
25 have been sold for over 50 years. And literally thousands have

1 been sold in the U.S. during this time, for anyone to see,
2 anyone to inspect and anyone to take apart. There are a lot of
3 O-style watertube package boilers out there.

4 I'm just going to show a couple from their Web
5 sites. This is a Thermal boiler, it's an O-style boiler. This
6 is the Tomlinson boiler, another O-style boiler, from
7 Australia. This is Nebraska, this is a brochure for their
8 A-boiler. But Nebraska, you will see, has extensive designs
9 available on their O-style watertube package boiler on their
10 Web site and in their brochures.

11 And then finally there's a company -- well this is
12 Aalborg Industries. But there's another company in Denmark,
13 Aalborg Engineering. That was a licensee for Zurn back in the
14 '80s. And Aalborg Engineering still sells an O-style watertube
15 package boiler today. Even though they're not a licensee
16 anymore. Has Indeck sued them. No.

17 Now, there are even more companies out there that
18 sell boilers with membrane walls. Membrane walls, ladies and
19 gentlemen, are not a secret, they've been around for over 50
20 years. These companies, just to name a few, Victory Energy,
21 Rantack Boiler, Babcock and Wilcox. Foster Wheeler, Thermal
22 Boiler. Nebreska Boiler. Makkay. There's Aalborg
23 Engineering, the Danish company I was telling you about.
24 Johnson Boiler. Cerray. English Boiler and Tube. And
25 Combustion Engineering.

1 Membrane wall technology, ladies and gentlemen, is
2 not a secret. If both companies make boilers with two-inch
3 tubes that are four-inches apart, that is not a secret. There
4 are a lot of other companies out there that do that.

5 Now, there are literally thousands of package
6 boilers out there that are used and scraped. It is very easy
7 for boiler manufacturers to look at what their competitors have
8 done. They can go to scrap yards and reconditioning yards or
9 they can do it themselves. Look at how the boiler is laid out
10 specifically.

11 This is an old Nebraska O-style watertube package
12 boiler that was in the refurbishing process at a company in
13 Texas. These photos show that the bottom of the boiler, this
14 is the mud drum that you heard about. Here's the tubes coming
15 out of the mud run. There's the furnace wall right there on
16 the inside. If you can go and look at these boilers, take them
17 apart and see them like that, it's not a secret.

18 In fact, what that's called, ladies and gentlemen,
19 is reverse engineering. Reverse engineering is good for
20 competition. Reverse engineering, if there's not a patent that
21 covers the technology, if there's not a copyright that covers
22 it and you can take it apart and see it, it's not protectable,
23 it's not a secret. It's not long. It's good for competition,
24 it's something that companies have been doing here in the
25 United States and abroad for hundreds of years.

1 Through a review of what's available publicly, a
2 boiler manufacture can learn many, if not all of the boilers,
3 of the competitor's boiler's features. For instance, one of
4 the design features of the Keystone boiler that you heard
5 about, and this is on an old Zurn brochure, is the water cooled
6 throat. Jeremy, can you go to that page.

7 Within this brochure -- when Jeremy gets to it,
8 you'll see a photograph of the water cooled burner throat on
9 the Keystone O-style watertube boiler. Again, this brochure
10 has been around for over 15 years. I'll show you a photograph
11 like that later.

12 But the point is companies show in their own
13 brochures, in their own advertising materials, specifically the
14 design features that Indeck wants to claim it can throw a rope
15 around it because it was a design of a licensed product at one
16 time and say nope, that's ours, you can't have it. Well,
17 ladies and gentlemen, that's bad for competition. They don't
18 have a patent, they can't throw a rope around it and tell other
19 companies they can't use it. That's not what the law is.

20 It's your job as the jury to sit here and recognize
21 and to weigh the evidence that if it's not a secret, it's what
22 we can see, it's not bad, it's not copying. And Indeck will
23 fail ultimately to be able to show that there are any trade
24 secrets here.

25 You can see from this photograph from the Zurn

1 boiler that water cooled burner throat. You can see the scale
2 of the boiler with these two gentlemen standing in front of it.
3 If this is such a high tech secret, why are they putting it
4 inside their own brochures. I think the brochure speaks for
5 itself, ladies and gentlemen, it's not a secret.

6 So Indeck's claims since they don't have patent or
7 copyright claims, they all boil down to essentially trade
8 secret claims. What is a trade secret. Well, the most famous
9 trade secret you hear of is the formula for Coca-Cola. Okay,
10 the formula for Coca-Cola is closely guarded. It is in a vault
11 down in Atlanta. You can't have access to the recipe for
12 Coca-Cola. They sure don't put it in their advertising
13 brochures.

14 That's a trade secret, that's not what we're talking
15 about here, ladies and gentlemen. If they can be reversed
16 engineered, if it's out there in the public domain, if other
17 companies are doing it, it cannot be a trade secret.

18 Now, one of the things you heard me mention a minute
19 ago was the use of two-inch tubes four-inches apart. You're
20 going to hear from Indeck's expert that this design feature was
21 copied by Victory Energy, two-inch tubes four-inches apart.
22 And if you look at this brochure from Babcock and Wilcox of its
23 FM package boiler, specifically, here are two-inch tubes on
24 four-inch centers of their membrane wall for their D-style
25 boiler. Babcock and Wilcox has been doing this for a number of

1 years. Indeck hasn't sued them.

2 And then in the specification on the Nebraska Web
3 site, there is a specific reference on what they use. It says
4 "membrane design will consist two-inch outer dimension tubes on
5 four-inch center lines, with membrane fins between the tubes."
6 So Nebraska boiler is allowed to use it, but apparently Victory
7 is not. Why, beats me, ladies and gentlemen. It's not a
8 secret.

9 The design features of the Keystone boiler are
10 capable of reverse engineering. As I told you, these Keystones
11 have been out there for over 50 years, 3,000 of them, it's not
12 a secret.

13 Plaintiff's own manager of field services, Mr.
14 Martin Swabb, will get up and testify later today. He will
15 tell you that in his opinion there is not a single feature of
16 the Keystone boiler that cannot be reversed engineered. Their
17 own manager of field services will testify to that. And why,
18 because it isn't a secret.

19 Now, they point to, Indeck points to its drawings
20 and says that's where the secret is, ladies and gentlemen, it's
21 drawings. Well, the drawings that they're talking about are
22 given out to customers as a matter of course. When you buy a
23 boiler, you get a set of drawings with your boiler.

24 Mr. Robert Gdaniec will get up and testify that when
25 he was the director of engineering at Erie Power, they would

1 have sent these drawings out to customers. Mr. Martin Swabb
2 will tell you the same thing. These drawings are given out as
3 a matter of ordinary course in selling these boilers.

4 Now, this is the front cover of the operations and
5 maintenance manual from Aalborg Industries. Remember when I
6 showed you a minute ago -- Aalborg Industries used to make the
7 Keystone boiler. And Victory bought two of these boilers two
8 years before the License Agreement. So they knew what Keystone
9 boilers were. And they knew what they were getting. These
10 boilers are membrane wall boilers, ladies and gentlemen.

11 And what Victory got with the boilers were these
12 drawings, identified on the second page, welded front wall
13 assembly. Welded rear wall assembly. Welded outer wall
14 assembly. Welded furnace wall assembly.

15 Victory Energy got these drawings with the boilers
16 as a customer, ladies and gentlemen. They weren't a licensee.
17 They were just buying these boilers, and they got these
18 drawings that Indeck wants to tell you now are closely held
19 trade secrets. If they're giving them out to customers,
20 they're not trade secrets. Well, they'll try and tell you no,
21 but we tell our customers they're subject to a confidentiality
22 agreement.

23 Not in this case, ladies and gentlemen. Victory
24 Energy had its own terms and conditions, which took precedence
25 over all the other terms and conditions of the sale. Go to the

1 next slide, please, Jeremy.

2 Victory's terms and conditions, it specifically
3 provides that when Victory bought these boilers, it wasn't just
4 buying the boilers, it was entitled to -- if you look at
5 paragraph 11 of Victory Energy's terms and conditions --
6 Victory Energy was entitled to a full unrestricted ownership of
7 all right to use all technical information provided to Victory
8 Energy under this purchase order, shall be transferred to
9 Victory Energy. Victory Energy received the drawings and
10 Aalborg Industries agreed under these terms that the drawings
11 were Victory's.

12 So the drawings that Indeck is going to tell you
13 were copied or stolen, they gave them out to Victory two years
14 before the license. How could they be copied or stolen.
15 Ladies and gentlemen, Indeck doesn't have any trade secrets
16 that Victory Energy used on the Voyager.

17 Now, they showed you some drawings. They showed you
18 some bright and colored features on those drawings. As I told
19 you before, there is nothing wrong with copying if it isn't a
20 secret.

21 As I also told you, there are significant
22 differences in the Voyager. The tubes are different, the model
23 sizes are different. The drum layouts are different. The
24 similarities of the boilers are driven by the fact that they're
25 both O-style boilers. They both have a drum on top and a drum

1 on the bottom.

2 And that the sizes of these boilers are frequently
3 dictated by shipping restrictions. You can only put a boiler
4 so wide on a truck and so long. You can only put a boiler so
5 wide and so tall on a rail car. So a lot of the boiler
6 restrictions that they're going to point to as copied or
7 substantially similar, are governed by what the transportation
8 department tells you you can put on a truck. That's not a
9 trade secret.

10 Now, Victory developed the Voyager boiler as a
11 better mousetrap. It's designed specifically to meet the needs
12 of the ethanol fuel market. You'll hear John Viskup tell you,
13 and Mark White, that they designed the Voyager specifically to
14 meet the needs of that market. Boilers are meant to run at a
15 space rate, for a length of 365 days a year, and they're built
16 to be cost competitive. That's different from the Keystone.

17 Keystone's were designed back 40 years ago and they
18 don't have a lot of the same upgrades and a lot of the same
19 improvements that the Voyager now has. So how can you say that
20 they're copied if you admit that they're different. You're
21 going to have to figure that one out, ladies and gentlemen,
22 because I don't think it makes sense.

23 Now, what do they say was copied on those drawings.
24 If you look at the drawings themselves, and they say this was
25 copied, first of all, Victory had full right and title and

1 ownership to those drawings.

2 Second of all, the things that they point you to, if
3 you read them, are common sense, and they're out in the public
4 domain. The first note says clean tubes before welding. Is
5 Indeck claiming that cleaning the tubes before welding is a
6 trade secret. Is that something that not every welder knows
7 how to do.

8 The second note says set and align tubes. Well, I
9 guess their right, the tubes aren't going to stand up and set
10 and level themselves on their own.

11 The third note that they pointed to was a welding
12 guideline. As I told you earlier, the American Welding Society
13 sets forth specific standards for welders to use when they're
14 welding boilers, and they provide those symbols that you're
15 supposed to use. So Indeck can't claim that symbols dictated
16 by the American Welding Society and the welds mandated by the
17 ASME code are trade secrets.

18 Finally, ladies and gentlemen, the one I already
19 mentioned to you, the use of two-inch tubes four-inches apart.
20 I don't know how this could be a trade secret, ladies and
21 gentlemen. If I can walk up to this wall, put my ruler on the
22 center line of this tube, go over to the next tube, and see
23 that it's exactly four inches, that cannot be a trade secret,
24 ladies and gentlemen. And my five-year-old can come up and do
25 that, so this can't be a trade secret. And as I showed you

1 before, there are many other companies out there doing it
2 already.

3 Now, you haven't heard me talk about unfair
4 competition at any point. This is because the only company
5 that has competed unfairly here is Indeck. We have
6 counterclaims in this case specifically addressing and
7 concerning the conduct of Indeck as it relates to Victory
8 Energy in the marketplace.

9 When Indeck became the licensor, Chris Petcos, the
10 general manager of Indeck, met with Victory Energy's sales
11 representatives. He specifically said if you want to represent
12 our products, you can't represent Victory Energy. And, by the
13 way, Victory Energy, they're only allowed to sell the tangent
14 tube boilers with the refractory front wall. The boilers I
15 told you already that nobody wants. So using that statement,
16 that misstatement of what the contract says, Mr. Petcos
17 convinced some of Victory Energy's sales reps to dump Victory
18 and go with Indeck. Victory Energy lost sales as a result of
19 that.

20 Moreover, it damaged the reputation of Victory
21 Energy to its reps and to customers in the industry. Just
22 before Indeck purchased the assets of the Keystone boiler, an
23 Indeck representative went to the University of Notre Dame.
24 Victory Energy had been trying to sell a boiler to the
25 University of Notre Dame, was on the short list to sell that

1 boiler. The Indeck rep went to Notre Dame, and told Notre Dame
2 that if we buy these assets, Victory Energy will not be allowed
3 to perform under the contract, we're not going to let them
4 build the boiler and they don't have the engineering on their
5 own to do it. Victory Energy, their reputation and their
6 ability to compete fairly in the marketplace was injured as a
7 result of that statement.

8 And then just last October, Victory Energy, it was
9 down to two companies, Victory Energy and another company, to
10 sell 10 boilers for ethanol plants to a company called MECS, in
11 St. Louis. Again, Mr. Petcos picked up the phone when he found
12 out they've been bounced off the list, and said is Victory one
13 of the companies, well, you should know Victory Energy, we're
14 in a lawsuit with them. We think that they've stolen our
15 technology. If you buy these boilers, they may not be able to
16 deliver on those boilers. That injured Victory Energy's
17 reputation.

18 You're going to hear the testimony of Caspar
19 Kovarick who will say yeah, I'm leery, I don't want to do
20 business with a company that's getting sued over technology.
21 Those kind of statements are exactly the evidence you will hear
22 that shows Indeck is the company that's been competing
23 unfairly. Indeck is the company that does not want to compete
24 with Victory on a fair and level playing field.

25 Ladies and gentlemen, you will hear a lot of

1 testimony and be shown a lot of information over the next few
2 days. We ask that you to look at the parties' intent. What
3 did they mean, what were their goals and motives. The motive
4 you will see for IKE is competitive revenge.

5 You will hear Indeck's witnesses, remember to follow
6 the money. What did they do. They took the royalties. Follow
7 the money, ladies and gentlemen.

8 When they're trying to tell you something else, look
9 at what they did. Erie Power needed cash and the only type of
10 boiler that Victory Energy would be able to sell were the
11 membrane wall boilers. Follow what they did, not what they're
12 telling you today.

13 Indeck is attempting to protect something that
14 cannot be protected, ladies and gentlemen. A product that's
15 been on the market for many, many years. We are not talking
16 about the secret to Coca-Cola. We're not talking about the
17 recipe to Kentucky Fried Chicken.

18 I can take a boiler apart, not me, a competent
19 boiler manufacturer could take this boiler apart and figure out
20 how it works and make another one. That's good for
21 competition, ladies and gentleman, it's not wrong, and it's not
22 copying. And it's not unfair competition or misappropriation
23 of a trade secret. Don't be fooled by what they call copying
24 of similar instructions or welding symbols. These designs are
25 out there for anyone to see.

1 Listen to the evidence, we believe at the end of
2 this trial you will return a verdict in our favor. Thank you,
3 very much.

4 THE COURT: Who is your first witness?

5 MR. GISLESON: Our first witness is Martin Swabb.

6 THE COURT: Come up, sir, I'm going to swear you in.

7 MARTIN SWABB, PLAINTIFF'S WITNESS, SWORN

8 DIRECT EXAMINATION

9 BY MR. GISLESON:

10 Q. Would you state your name, please?

11 A. Martin Swabb.

12 Q. Mr. Swabb, how are you employed?

13 A. I'm the field service manager for Indeck Keystone Energy.

14 Q. Before going into that, could you describe for the jury,
15 please, what your educational background is?

16 A. I'm a graduate of Gannon College --

17 THE COURT: Mr. Swabb, would you be so kind to pull
18 in just a little bit or pull that out, either way whatever
19 works easier.

20 THE WITNESS: Okay. Graduate of Gannon College here
21 in town, went to night school for 11 years to get my B.S. in
22 mechanical engineering.

23 BY MR. GISLESON:

24 Q. How did you get involved in the boiler business?

25 A. I'm second generation. My dad started with Erie City

1 Iron Works right after World War II. He was an inspiration for
2 me to stay in the business, so to speak. So I started right
3 after high school, I graduated on a Friday and started with
4 Erie City Iron Works on a Monday the following week at the age
5 of 18.

6 Q. What was it about the boiler business that interested
7 you?

8 A. I was fascinated, it involves every type of engineering
9 that's available. Chemical engineering, electrical
10 engineering, structural, thermal design, I was just fascinated
11 with it. We toured Front Street station here in Erie when I
12 was 11-years-old. I was amazed that something was burning
13 rock, I thought was burning stone, was actually burning coal.
14 And that tour on that Sunday with my dad, and that look in his
15 eye saying he was so proud of what he did, because two of the
16 boilers down there were Erie City Iron Works boilers. So when
17 we got done, I said dad, I'm going to be a boiler man. Seven
18 years later I was. Still am at 40 years later.

19 Q. What was the position that you had with Erie City Iron
20 Works when you joined?

21 A. When I started, I was a rookie draftsman fresh out of
22 high school. In my senior year of drafting, Mrs. Dombrowski
23 was my teacher, okay, I can put a drawing pretty good, at least
24 enough to get in here. It was nice being second generation, my
25 dad got me the chance to get in. I interviewed and said hey, I

1 want to start in, I started as a rookie draftsman, I started at
2 the bottom.

3 Q. You were talking about being a rookie draftsman, what
4 does it mean to be a draftsman?

5 A. A draftsman in those days was all manual drafting. A
6 pencil in hand and your instruments, you drew on paper. Not
7 today with all the computers, which is kind of nifty.

8 THE COURT: You're going to have to slow down just a
9 little bit for my court reporter. He's one of the fastest
10 you're ever going to find, but he's not that fast. Slow down a
11 little.

12 THE WITNESS: I'm sorry. In the old days it was
13 actually slower, maybe not slower, but we drew on paper. We
14 didn't draw with electrons. So that is how I started. We had
15 a drafting machine, a drafting board, our pencils and erasers,
16 so forth and that's how we did our drawings. And you learned
17 as a rookie draftsman you're under the tutelage of senior
18 people and checkers that teach you as you go. Including it was
19 nice to have my dad guide me on a few items as well, because he
20 was a design drafter, which was a lot more advanced than I was
21 at the age of 18.

22 BY MR. GISLESON:

23 Q. When you mentioned checkers, what do checkers do?

24 A. The drafter makes the drawing, but it's not done until
25 somebody looks over it to make sure he has it done right. You

1 put a drawing out in the shop, get it out there and find out
2 that oops, and when it's made of steel, it's an an expensive
3 oops. When it's just pencil and paper, you can use your eraser
4 to cure the your oops real quick. The checker checks your
5 drawing to make sure you haven't made any errors, either in the
6 design or in the interpretation of the design. Or in the
7 dimensioning, so that you aren't going to have a problem in the
8 shop or in the field with. So the checker checks it, gives it
9 back to you, you make the corrections because it's also a
10 method of teaching, to make sure that you learn from your
11 mistakes so you don't make the mistake the next time.

12 Q. Sir, can you describe for the jury, please, what the
13 background is on Erie City Iron Works; when it was founded,
14 moving forward?

15 A. Well, Erie City Iron Works in 1840 started out as Presque
16 Isle Iron Works. And Presque Isle Iron Works made some farm
17 implements and so forth. However, when the City of Erie became
18 a city about 1850, '51, in honor of that, Presque Isle Iron
19 Works changed its name to the Erie City Iron Works. Erie City
20 Iron Works at that time had moved from just doing farm
21 implements and cast iron pieces for farming and machinery, they
22 started getting into boilers, a fire tube type of boiler. I'll
23 explain that later on. But they got into boilers and steam
24 engines because we followed the industrial revolution and now
25 steam was king, that was the primary mover. And the primary

1 way of conveying chemical energy in the form of coal mostly at
2 that time, some oil and wood, of course. Making steam, the
3 steam would drive the steam engine, the steam engine would do
4 all kinds of things. From cutting lumber, to pumping a well,
5 to many things that were required at that time. We moved up,
6 it stayed as Erie City Iron Works all the way until, actually
7 it was like 1965, when Zurn Industries, who was also a local
8 industry, said well, we know you guys from before, we were
9 doing castings, piping and different valves that Erie City Iron
10 Works used to do. Erie City Iron Works at this time was so
11 busy making steam engines and boilers, one of which is the one
12 at Drake's well, by the way, that's our boiler. As a matter of
13 fact the reproduction is our boiler, too. That business, the
14 oil industry in Pennsylvania started to pick up. The whole
15 energy industry with boilers and steam driven equipment was
16 picking up. So we said Zurn, how about you taking over this
17 product line and make the valves and so forth like that. Zurn
18 said fine. Well, back in 1965, like I said, that relationship
19 goes back to 1900, around 1965 Zurn wanted to get bigger. They
20 decided to make us their first acquisition because they knew
21 us. Their families were somewhat intertwined with the families
22 that owned Erie City Iron Works at that time. And we were
23 their first acquisition. But in 1969 they changed the name
24 from Erie City Iron Works to Erie City Energy Division. And
25 finally they said let's just call it Zurn Energy Division.

1 It's too hard for the people answering the phone to go with
2 that long name. So we were Zurn Energy Division until 1997.
3 I came on board in '67, so I have some history along with it in
4 a number of different names. In 1997 Aalborg -- Zurn was
5 looking to sell the energy business, they approached Aalborg.
6 Aalborg knew us. Aalborg was one of our licensees back in the
7 late '70's, I was over in Denmark, Aalborg helped them at one
8 time as well, as a representative. So Aalborg knew us. They
9 said we know the company, we know the product line, so they
10 bought us, lock, stock and barrel. And from 1997 to 2002 we
11 were Aalborg Keystone. Then Aalborg Industries period. That
12 way all the Aalborg companies had the same name. And then in
13 2002 they sold us, and we became Erie Power Technologies, Inc.
14 EPTI as you saw on the chart. A couple years later on, in
15 2004, we became Indeck Keystone Energy, LLC. And that was a
16 good relationship because Indeck used to buy a lot of our
17 boilers as keystones as a matter of fact.

18 Q. Let me stop you right there, Mr. Swabb, can you put up
19 the demonstrative showing the time line, please?

20 A. There you go.

21 Q. Does this basically lay out the chronology of the
22 predecessor companies to Indeck Keystone?

23 A. Yes, '40, '51, Erie City Iron Works. '66, Zurn
24 Industries. '97, 2002, 2004, up to the present.

25 Q. Could you please describe for the jury, I know you said

1 you started as a rookie draftsman, then kind of working your
2 way forward, what the different positions were that you held
3 leading up to today?

4 A. From a rookie draftsman, I worked my way up through a
5 design drafter, to achieve the level that my dad did and of
6 course he had retired by just about that time that I had, it
7 was kind of passing the baton. So after that I became manager
8 of standards and special projects --

9 Q. What does standards mean?

10 A. Standards were like the M-Series. We have standard
11 drawings so that there were shop drawings, assembly drawings
12 and everything associated with the standard products line. One
13 that we had developed and evolved over the years. So you're
14 not redoing drawings all the time. It takes a while on the
15 drafting board to make all these drawings, you're making them
16 all manually. So once you arrive at a set of drawings that
17 reflects the experience and the success of that product, you
18 don't want to have to change those all the time. So I managed
19 those standards, we made sure they were organized, that they
20 were out to the shop, etc. That the drawings were in good
21 shape. The drawings lists were kept up, so as those products
22 that were sold, it was really easy to say well, the drawings
23 actually sat even in the shop, prints of these drawings, we
24 didn't have to order prints from the printing machines. All of
25 this was intended to save time --

1 MR. SHEEAN: We're going to object, this is a
2 narrative. There's no question.

3 THE WITNESS: I'm sorry. The idea of the standards
4 was to cut down time.

5 THE COURT: Hang on a second. Let's try to get back
6 into some kind of question and answer.

7 MR. GISLESON: Yes, your Honor.

8 BY MR. GISLESON:

9 Q. Mr. Swabb, what did you do after you were manager of
10 standards, we can get back into standard drawings after a
11 while?

12 A. After manager of standards, I was manager of components.
13 And that was for not only standards of boilers, but all the
14 boilers. We made the pressure parts, the tubes, the drums, all
15 the components that were the central part of the boiler. That
16 part of the boiler. There were other parts, the burners, the
17 electrical portion and so forth, that was outside of my realm.
18 So I had the main part of the boiler, the structures, the
19 pressure parts for all boilers, Keystone, as well as any other
20 products we did.

21 Q. How long were you the manager of components,
22 approximately?

23 A. I think about four years. Again, in 40 years it's kind
24 of hard to get these little gaps right.

25 Q. In which decades?

1 A. That was back in the '70s.

2 Q. And when you're talking about a pressure part, what do
3 you mean by pressure parts?

4 A. That's the part of the boiler, the drums and the tubes
5 that hold the water and steam inside. That's under that kind
6 of pressure, 100 pounds and so forth on up. That's pressure
7 parts. The structures are the part that holds it up.

8 Q. When did you do after you were the manager of components?

9 A. After manager of components, because I knew the product
10 line so well, I went also into a year in sales to do more
11 interaction with the customers directly. And to work to sell
12 some of these products as well. Then I went from sales into
13 manager of design and projects. That way I was over the
14 engineering department, the guys that did the designs, the guys
15 that managed the projects. As we got an order, it goes to the
16 project manager, his group would take care of that. Then as we
17 grew, we were getting busier and busier, that was just too much
18 for one man, so I took over the projects and another fellow
19 took over the design engineering. I managed the projects up to
20 1990.

21 Q. Let me stop you there real quick. When you say you're
22 managing projects, what kind of projects?

23 A. Projects are orders that have been sold. It's the
24 boiler, all the pertinences, taking care of the client, taking
25 care of submittals to the clients and making sure the parts are

1 ordered. It's managing the projects from the sales to the
2 delivery. That's part of project management portion of the
3 project.

4 Q. After that point in time when you were manager of design
5 projects, what did do you?

6 A. Actually, after manager of project management, which came
7 after the design of projects, and this is in 1990, I became
8 field service manager. That's the position I've held since
9 then.

10 Q. What do you do as field service manager?

11 A. As field service manager, we start the product, we
12 commission it, as the term that's used, we start up the units,
13 we troubleshoot the units, if the clients have a problem we
14 help them. We service older units, rather large installed
15 boiler base. So the clients will call in, they'll say I need a
16 guy here to do a tuneup on it. The boilers are big enough that
17 you don't drive them into the dealership and service it, you've
18 got to go out to the boilers. So the guys that go out in the
19 field are under my direction and scheduling and selection, they
20 go to the client and take care of whatever has to be taken care
21 of on the boiler and help guide the client to make sure he can
22 operate the boiler properly, safely and efficiently.

23 Q. Now, leading up to the time that Indeck Keystone was
24 formed, what were the different products in which you were
25 involved?

1 A. Package boilers, heat recovery boilers. Two drum type
2 units. Two drum type units are units that use solid fuels,
3 that burn coal or wood. Every product line that we build,
4 process steam drums, everything that we build.

5 Q. Now, over the time period leading up to Indeck being
6 formed, did you have any involvement with Keystone boilers?

7 A. Yes, from day one, from 1967 on, I started working on
8 Keystones, it was the first drawings that I made in '67.

9 Q. Can you describe for the jury the different areas in
10 which you've involved with Keystone boilers?

11 A. Oh, from making just detailed drawings for a specific
12 order, special unit. To actually doing the designs for the
13 units and developing the upgrades to the boilers. Working with
14 the shop to make sure that the upgrades we were going to do
15 would go through the system in the shop. That the fellows
16 could make it in the shop safely and easily. And also to have
17 a product that continues to be competitive.

18 Q. In terms of being field service manager, did you ever get
19 involved with servicing Keystone boilers?

20 A. Oh, yes, all the time, daily. Because we have so many
21 out there. There's over 2,000 out there, probably 60 percent
22 are still operating today.

23 Q. Can you give the jury some idea as to how old some of the
24 boilers are that are currently being served by you as field
25 service manager for Indeck?

1 A. As a matter of fact in Ohio, I'll probably have a guy
2 going next week or the week after, depending on our schedule,
3 to service a boiler that's 1957 vintage. That was 10 years
4 before I came on board, so it's still working.

5 Q. Were you the only engineer who worked at Erie City Iron
6 Works, Zurn or Aalborg or the other companies?

7 A. With IKE?

8 Q. No, prior to IKE, Indeck Keystone, were you the only
9 engineer who was working at Erie City Iron Works or any of its
10 successor companies?

11 A. No, there's quite a few engineers, it's an engineering
12 intensive type product. Most of the products, even though we
13 talk about standards, most of them are custom units, are custom
14 designed for a specific client and his application.

15 Q. Every once in a while I'm having a little bit of
16 difficulty hearing, so if you would do me a favor and speak a
17 little bit more slowly, I'd I appreciate it.

18 A. Sorry.

19 Q. Can you identify some of the engineers with whom you
20 worked on Keystone projects?

21 A. One of the key engineers I worked with in much of the
22 development is Bob Seibel. He was my boss and my mentor as
23 well.

24 Q. What position did Mr. Seibel hold?

25 A. Chief engineer at that time.

1 Q. Can you identify any other engineers with whom you worked
2 pertaining to the Keystone?

3 A. Oh, Dave Briggs. Well, he's not an engineer, he's one of
4 the drafters, he and I worked very closely from the component
5 days continuing to today.

6 Q. Let me stop you there real quick. How was it that you
7 and Mr. Briggs as a drafter worked closely?

8 A. He worked for me in components. Many times I would check
9 his drawings.

10 Q. Sir, can you identify any other engineers involved with
11 the development or otherwise with the Keystone?

12 A. Going back, there's so many, my dad worked on the
13 Keystones with me as well as one of the drafters. Frank Vonna,
14 some of the fellows are over the years have now been retired.

15 Q. The jury heard during opening statements the name Bob
16 Gdaniec?

17 A. I'm sorry, Bob Gdaniec as well. He's not working with us
18 now.

19 THE COURT: Sir, you remind me of that racehorse who
20 just won the Kentucky Derby. You've got to really slow down,
21 make an effort to do that.

22 THE WITNESS: I'm sorry. Bob Gdaniec, he's with CMI
23 at this time.

24 BY MR. GISLESON:

25 Q. What's CMI?

1 A. CMI is, we worked part of the same company, Erie Power
2 Technologies, when the bankruptcy settlement was closed, CMI
3 took the heat recovery steam generators, Erie Power
4 Technologies took the rest of the product line. Bob stayed
5 with CMI, I stayed with Erie Power.

6 Q. Now, in terms of Indeck Keystone Energy, what's the
7 business of Indeck Keystone Energy?

8 A. Indeck Keystone Energy designs, markets boilers.

9 Q. What kind of boilers?

10 A. All types of boilers. Package boilers. Coal-fired
11 boilers. Keystone boilers. Smaller HRSG boilers.

12 Q. Now, when you're talking about a package boiler, what
13 does that mean?

14 A. A package boiler means that it's essentially a complete
15 unit, that you can install it, everything is pretty much on it.
16 All you have to do is hook the utilities to it. The
17 electricity, the water, the fuel. That's the idea of a package
18 boiler, it minimizes set up in the field and tries to have very
19 little construction going on in the field, that takes a lot of
20 time.

21 Q. Is the Keystone boiler a package boiler?

22 A. Yes, sir.

23 Q. You also mentioned HRSGs, what are HRSGs?

24 A. Heat recovery steam generators. That's such a long name,
25 that's why we call them HRSGs. In other words, it doesn't have

1 a burner per se. It takes a heat source that's an exhaust,
2 from a combustion turbine, from a diesel engine, it takes the
3 heat from that exhaust, absorbs that heat in tubes, it's a
4 watertube type boiler. Generates steam, cools the exhaust.
5 That steam is then used for either process or generating more
6 electricity in a steam turbine generator.

7 Q. Where does the heat come from?

8 A. From the combustion process in the turbine or in the
9 diesel engine.

10 Q. How does that compare to the Keystone boiler?

11 A. Well, actually, you can use a Keystone as a waste heat as
12 well.

13 Q. What is the difference?

14 A. Most of the time the waste heats we work with, although
15 not always, have actually fins on the tubes. Not bare tubes,
16 like a Keystone, they have a spiral on fit, kind of looks like
17 a radiator in your car, it has all kinds of fins on it. It's a
18 way of extending the surface. Instead of just a bare tube,
19 which only has so much surface, you adds all kinds of fins on
20 it, that extends the surface and allows you to absorb more heat
21 more quickly.

22 Q. Is there a burner in a HRSG?

23 A. Not always, no. There can be, though. The burner,
24 instead of a circular burner like you see in a Keystone, is a
25 duct burner. It's a series of pipes in the duct that burns the

1 fuel. Whereas, the Keystone has a circular burner in the
2 center of the furnace or two, that is mounted on the front end.

3 Q. What's the address for where the home office is for
4 Indeck Keystone Energy?

5 A. 5451 Merwin Lane.

6 Q. Where is that located?

7 A. That's out at Penn State Behrend campus, it's the
8 Knowledge Park area there.

9 Q. How long has Indeck Keystone been in business,
10 approximately?

11 A. Since September, 2004.

12 Q. Did you start working with Indeck Keystone right from the
13 beginning?

14 A. Yes.

15 Q. How many employees did Indeck Keystone have at the
16 beginning?

17 A. Eleven.

18 Q. How many does it currently have?

19 A. Twenty-eight.

20 Q. Now, in terms of the 28 employees who are currently
21 there, how many of them had a relationship with one of the
22 predecessor companies of Indeck Keystone?

23 A. All 28.

24 Q. Can you give some idea to the jury as to what the average
25 length of time those employees worked with one of the

1 predecessor companies as to the present?

2 A. Oh, goodness. Probably the average tenure --

3 MR. SHEEAN: Judge, I'd object, this is speculation.

4 THE COURT: Lay the foundation.

5 BY MR. GISLESON:

6 Q. Did you previously work with any of the 28 people prior
7 to the formation of Indeck Keystone Energy?

8 A. Yes.

9 Q. Over what period of time have you worked with the various
10 individuals that comprise that 28?

11 A. Well, I've been there 40 years. Some haven't been there
12 quite that many years.

13 Q. Throughout those 40 years, did you at some point work
14 with each of those 28 individuals?

15 A. Yes.

16 Q. Now, you said you're currently manager of field services.
17 How much of your time is spent on Keystone boilers?

18 A. In the service department, probably about that 60 to 70
19 percent.

20 Q. And is that business profitable or unprofitable for the
21 company?

22 A. It's profitable.

23 Q. Now, let's talk a little about what boilers are
24 generally, and can you explain for the jury what a boiler is,
25 and I'm focusing on an industrial boiler as opposed to one that

1 would be in residential use?

2 A. An industrial boiler, the type of boilers we produce make
3 steam.

4 Q. How is the steam used?

5 A. Steam could be used in anything from cooking dog food, to
6 driving a turbine to make electricity. To starting up a
7 nuclear power plant. To heating the Saint Vincent's Hospital
8 here in Erie. For example, there are two of our Keystones in
9 the basement there. Heating hospitals. Heating schools,
10 prisons. Anywhere where steam is used we can furnish that
11 steam.

12 Q. Could you put up please the demonstrative exhibit. Mr.
13 Swabb, can you describe what is shown here -- can you explain
14 for the jury what is shown in this sequence of pictures?

15 A. This is the same boiler at different sequences of
16 assembly in the shop. It's just a brief view to tell people
17 that, when you want to buy one, here's kind of the stages you
18 go through to make it. The first stage in the upper left-hand
19 corner is showing the tubes. This is a tangent tube unit.
20 It's not a standard Keystone, but it's a tangent tube unit that
21 has essentially the same features.

22 Q. Let me stop you right there first. When you talk about
23 tangent tube, what does that mean?

24 A. Tangent tubes are two-inch od tubes on four-inch centers,
25 two-inch centers, I'm sorry.

1 Q. What is meant by the word tangent?

2 A. Tangent tubes means they're shoulder to shoulder, they're
3 touching.

4 Q. Now, in this first picture here, how many different rows
5 of tubes are there?

6 A. You have one row of furnace tubes, that's two tubes
7 involved, that's the inside circle.

8 Q. What is the purpose of the furnace tubes?

9 A. The furnace tubes envelop the flame.

10 Q. What's the source of the flame?

11 A. The flame is a burner that's mounted in the front of the
12 unit which should be coming in from the left.

13 Q. Which tubes take on the highest amount of heat in a
14 Keystone boiler?

15 A. The furnace tubes.

16 Q. What's the next row of tubes called?

17 A. The next row of tubes is the convection tubes.

18 Q. What do the convection tubes do?

19 A. The convection tubes take the heat from the flue gases
20 that are rubbing against those tubes. They're space tubes,
21 they're not tangent.

22 Q. When you're talking about flue gases, what does that
23 mean?

24 A. That's the products of combustion. That's the exhaust
25 gases.

1 Q. Are the exhaust gases something that need to be
2 controlled?

3 A. Yes.

4 Q. Where do they eventually end up?

5 A. They eventually end up going out the stack.

6 Q. And then after that convection tubes -- how many rows of
7 convection tubes are there?

8 A. This particular unit has three.

9 Q. And then what's the next row of tubes?

10 A. The next row is tangent tubes, the tangent outer wall
11 tubes that hold the flue gases in the combustion, go through
12 the combustion chamber, the gases go to the rear of the
13 combustion chamber and come back up through the boiler bag.
14 The outer wall tube is another tangent wall to form like the
15 side walls of the whole thing.

16 Q. Now, what's the purpose of the outer wall tube?

17 A. To contain the heat and also to absorb the heat, generate
18 steam.

19 Q. Now, the jury heard during opening statement about an
20 O-type boiler versus a D versus an A; what type of boiler is
21 this?

22 A. It's an O.

23 Q. How can you tell?

24 A. You have symmetrical drums, and the tubes form like
25 concentric Os, concentric circles.

1 Q. What is the drawing down here called and what is its
2 purpose?

3 A. That's a lower drum, also known as a mud drum, you can
4 use the terms interchangeably.

5 Q. What's the purpose of the lower drum or the mud drum?

6 A. Just to collect the tubes and feed water to the boiler
7 bank tubes, all the boiler tubes.

8 Q. Does the water actually circulate from each of these
9 different rows of tubes?

10 A. Yes. There has to be water in all the tubes.

11 Q. What happens if there isn't?

12 A. They burn out.

13 Q. That's a maintenance problem that you would address?

14 A. Yes.

15 Q. And then what happens in the upper drum?

16 A. The upper drum collects the tubes at the top and that's
17 where the steam is released.

18 THE COURT: Mr. Gisleson, we're going to take a
19 five-minute recess.

20 MR. GISLESON: Yes, your Honor.

21 (Recess at 3:47 p.m.; until 4:00 p.m.).

22 THE COURT: All right, Mr. Gisleson.

23 BY MR. GISLESON:

24 Q. Can you put up the exhibit. Just to quickly run through
25 these again. You said that there are different phases of

1 construction. Walking through going clockwise, can you explain
2 what is shown in each of these pictures?

3 A. The first picture in the upper left-hand side is as
4 they're tubing the boiler, that's putting the tubes in the
5 drum, and expanding the tubes.

6 Q. And then the next picture, please?

7 A. The next picture to the right is putting the seal casings
8 on the tangent tubes.

9 Q. What is a seal casing?

10 A. The seal casing is a sheet metal casing, it's like a skin
11 on the boiler that is seal welded to keep the gases inside.
12 The pressure inside the boiler is greater than atmospheric
13 pressure.

14 Q. The significance of which is what?

15 A. If it leaks out, you'll get burned. So the idea of the
16 skin casing is to stay against the tubes, to to stay cool,
17 expand with the tubes. Then the stiffeners, the parts that
18 look like studs.

19 Q. Do you mean the long vertical bars?

20 A. Correct, those we call stiffeners. That holds the
21 casings against the tubes, to keep it in minimum contact with
22 the tubes. And also because of the pressure inside, you don't
23 want it to go like a balloon. That type of thing going on
24 where it bulges the casings. Also, the stiffeners also help
25 hold the insulation and the outer casing on.

1 Q. For this one there are two holes in the front, why are
2 there two holes?

3 A. Two burners.

4 Q. Is there always two burners in a boiler?

5 A. No.

6 Q. What's the alternative?

7 A. One burner. For the Keystones, it's usually one or two.

8 Q. Go to next photo, please. What does this show?

9 A. This one shows the insulation being applied to the seal
10 casing.

11 Q. What is the purpose of the insulation?

12 A. To keep the heat in, and keep the heat off of people
13 walking by.

14 Q. And the last photo?

15 A. The last photo is it loaded on to the rail car ready for
16 shipment to the customer.

17 Q. Is that what's meant by a package being shipped as an
18 integral unit?

19 A. Correct, it has the burners installed, there's piping and
20 trim, it's just about ready to operate.

21 Q. How long has the Keystone boiler been in existence?

22 A. Since 1950.

23 Q. Has the design been static, remained the same from 1950
24 to the present?

25 A. Not at all, it's always evolving.

1 Q. Now, how are the sizes of the boilers measured, for the
2 Keystone boilers?

3 A. The keystone boilers, the modern package boilers today
4 are measured in the steam they generate, how many pounds per
5 hour. That's defined by your client, if he says I need 100,000
6 pounds of steam per hour, so you select the boilers based on
7 the fuel that he wants to burn to achieve that. And he'll say
8 I want that 100,000 pounds per hour, at 100 pounds, 200, 300,
9 depends on what he wants to use the steam for.

10 Q. And what's the range in pounds per hour from smallest to
11 largest for a Keystone of any kind?

12 A. From 20,000 pounds per hour, which would kind of fit in
13 the basement of our house, to 450,000 pounds per hour, where
14 you could probably actually fit your house in the furnace. So
15 it kind of gives you an idea of the scale. They're big.

16 Q. Now, for the 450,000 pound unit, is that a package unit?

17 A. No. That one is assembled in the field.

18 Q. What's that called?

19 A. Field assembled.

20 Q. If you could turn to 135, please, which is Exhibit P9,
21 and just to give some idea of the size of the boilers, if you
22 had to estimate what the pounds per hour is of this one in the
23 photograph --

24 A. That one, it's kind of hard to see the photograph with
25 the contrast, it's probably about 100,000 pounds per hour.

1 Q. Is that someone standing --

2 A. Yes.

3 Q. On a ladder of some sort?

4 A. No, he's just standing on the floor. Well, actually
5 there's like a step, like three steps.

6 Q. And what are they doing in this photograph?

7 A. It looks like they're trying to apply the furnace floor
8 seal, which is a refractory seal.

9 Q. Let me ask you this. By having a photograph like that in
10 a marketing brochure, are you opening up the barn door and
11 releasing all the secrets that are part of that boiler?

12 A. No.

13 Q. Why not?

14 A. Maybe you can see in the barn that it's a horse, but
15 that's about it.

16 Q. When did the manufacturing of Keystone boilers stop
17 locally?

18 A. 1995.

19 Q. Go to 133, please, in Exhibit P9. Where was the
20 manufacturing facility located?

21 A. 1422 East Avenue.

22 Q. Did you ever go on site to 1422 East Avenue?

23 A. I was there for 30 years.

24 Q. And what is shown in the picture on the right?

25 A. The picture on the right is a shot of the shop floor at

1 1422 East Avenue, kind of during the heyday. We were putting
2 260 boilers a year out of the shop. And this shows Keystone
3 boilers, as well as heat recovery boilers.

4 THE COURT: Excuse me, Mr. Gisleson, it occurs to
5 me, maybe you already mentioned it, but I see on the
6 photographs there are exhibit stickers, is that correct?

7 MR. GISLESON: Yes, your Honor.

8 THE COURT: Have we been identifying them as we go?

9 MR. GISLESON: I have't yet, I have been using
10 isolated photographs.

11 THE COURT: Just for future reference, both sides,
12 it's probably a good idea that there be a reference, for record
13 purposes, as to what everyone is talking about.

14 MR. GISLESON: Yes, your Honor. The numbers I've
15 been using are numbers, our Bates stamping system, but I'll
16 make sure in the future to identify specifically the exhibit
17 numbers.

18 BY MR. GISLESON:

19 Q. The photograph that we're looking at on the right is from
20 Exhibit P9, which is a copy of the Zurn/Keystone steam
21 generating systems sales brochure, is that correct?

22 A. Yes.

23 Q. Had you personally seen that brochure previously in the
24 past?

25 A. Yes.

1 Q. And on the right in the manufacturing facility, you said
2 that's where you worked for approximately 30 years?

3 A. I didn't work in the manufacturing facility, the
4 engineering office were across the street and under the
5 viaduct.

6 Q. So who currently manufactures then the Keystone boilers?

7 A. They truly can be manufactured anywhere in the world.
8 They're all out-sourced, it could be anywhere from Buffalo, New
9 York, to Korea, to Canada.

10 Q. For those party manufacturers, do they enter into
11 confidentiality agreements?

12 A. Yes, they do.

13 Q. For how many of them?

14 A. How many?

15 Q. Yes, some of them, all of them?

16 A. All of them, I don't know how many different
17 manufacturers we work with, I don't have a count.

18 Q. What are the types of fuel for the Keystone boiler?

19 A. For a Keystone package boiler, the primarily fuels are
20 liquid -- for the Keystone package boiler, there either gas,
21 like natural gas or liquid, like oils.

22 Q. Looking again at Exhibit P9 on page 139, can you identify
23 what this shows, please?

24 A. This shows, it's a pictorial representation of a tangent
25 tube Keystone, with a super heater.